202238

Canadian Embassy

Ambassade du Canada

May 16, 2001


Mr. Vernon A. Williams, Secretary
Surface Transportation Board
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582 (Sub-No. 1)
1925 K Street, N.W.
Washington, DC 20423-0001



**Re: Major Rail Consolidation Procedures (STB Ex Parte No. 582 (Sub-No. 1))**

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceedings are an original and 25 copies of (1) the Comment of the Canadian Government and (2) the Petition of the Canadian Government for Leave to File Out of Time.

Also enclosed is a diskette containing the text of these documents in WordPerfect 8 format.

Very truly yours,

Bertin Côté
Deputy Head of Mission and
Minister (Economic)

Enclosures

202238



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BEFORE THE
SURFACE TRANSPORTATION BOARD

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EX PARTE NO. 582 (SUB-NO. 1)

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MAJOR RAIL CONSOLIDATION PROCEDURES

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# COMMENT OF THE CANADIAN GOVERNMENT

Bertin Côté
Deputy Head of Mission and
Minister (Economic)
Embassy of Canada
501 Pennsylvania Avenue N.W.
Washington, D.C. 20001
(202) 682-1740 (ext. 7422)

On Behalf of the Government of Canada

May16, 2001

**BEFORE THE**
**SURFACE TRANSPORTATION BOARD**

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**EX PARTE NO. 582 (SUB-NO. 1)**

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**MAJOR RAIL CONSOLIDATION PROCEDURES**
**COMMENT OF THE CANADIAN GOVERNMENT**

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This Comment of the Canadian government addresses proposed §1180.11 which the Surface Transportation Board (STB) has put forward to address "transnational mergers" as part of its proposed new regulations for "Major Rail Consolidation Procedures." It is the view of the Canadian government that proposed §1180.11 raises significant issues concerning undue administrative burden, fairness and transparency, which, unless corrected, could amount to a violation of the national treatment obligations of the United States under Chapter 11 (Investment) of the North American Free Trade Agreement (NAFTA). The investment and trade goals of NAFTA would not be well-served by these provisions, which would create significant uncertainty for prospective applicants and the capital markets concerning the approach of the STB to transnational mergers.

The Canadian government has noted the clear desire of the STB to ensure that its proposed regulations for rail mergers are consistent with NAFTA. The Canadian

government welcomes the undertaking by the STB in §1180.1(k) of the general policy statement for the proposed regulations to consult as appropriate in support of this position. While certain parties to STB Ex Parte No.582 (Sub-No.1) have raised issues relating to the NAFTA, the Government of Canada considers this aspect of the draft regulations to be of such importance as to compel it to comment directly to the STB.

**The Proposed Measure**

As will be recalled, proposed §1180.11 applies specifically to transnational mergers, and reads as follows:

> **"Proposed § 1180.11 Additional information needs for transnational mergers.**
>
> (a) Applicants must explain how cooperation with the Federal Railroad Administration will be maintained without regard to the national origins of merger applicants.
>
> (b) Applicants must assess the likelihood that commercial decisions made by foreign railroads could be based on national or provincial rather than broader economic considerations, and be detrimental to the interests of the United States, and discuss any ownership restrictions imposed on them by foreign governments.
>
> (c) Applicants must discuss and assess the national defense ramifications of the proposed merger."

It should be noted that proposed §1180.11 applies only to transnational mergers, and thus constitutes an additional requirement imposed only upon transnational applicants. All other proposed regulations apply equally to both domestic and transnational applicants.

One purpose of proposed §1180.11 would appear to be to ensure that the STB has at its disposal a similar range of information with respect to transnational applicants as it has for domestic ones. This purpose is of itself understandable. However, if the exercise of collecting this information creates prejudicial uncertainties or additional burdens for transnational applicants, then questions of national treatment arise. This is particularly so if, as in this case, the additional information requested of a transnational applicant is only vaguely defined and is not demonstrably necessary, and failure to provide such additional information could result in pre-hearing dismissal of an application by a transnational applicant.

It is the view of the Canadian government that proposed §1180.11 is redundant, and that the various types of information requested thus amount to an unfair administrative burden. As this unfair burden applies only to transnational applicants and not to domestic ones, it is inconsistent with national treatment of foreign investors.

**Proposed §1180.11(a) -- Rail Safety**

Given that the proposed regulations require all merger applicants to provide an operating plan and a Safety Integration Plan, it is not evident why proposed §1180.11(a) is also required. Indeed, by imposing this additional requirement, the STB is in effect forcing non-U.S. applicants to profess their good faith simply because they are foreign. This is all the more striking in the case of the Canadian railways which have had major operations in the United States for a long period of time. Both Canadian National and Canadian Pacific are consequently well known to the STB, and

there have been no obvious problems with this relationship which would justify singling them out.

Safety is of course a vital concern, both to rail regulators and operators, and applies more broadly than in the context of a merger review. It is as such covered by the ongoing relationship between the Federal Railroad Administration and the rail operators, be they domestically-owned or foreign-owned. In light of the fact that there are already provisions in place which would allow the STB to query transnational applicants with respect to rail safety, it is clear that proposed §1180.11(a) is an unnecessary administrative burden.

**Proposed §1180.11(b) -- Foreign National or Provincial Goals**

Proposed §1180.11(b) not only requires transnational applicants to provide information about foreign policies, but also to "assess the likelihood" that foreign policies would have a detrimental bearing on their operations in the United States. This requirement for transnational applicants to assess the facts constitutes a hurdle not faced by domestic applicants. Moreover, national and provincial laws and policies in Canada, as in the United States, are public. The regular course of a merger review by the STB provides parties with ample opportunity to offer argument and evidence about such laws and policies and to explore their potential relevance to the commercial behaviour of a transnational applicant. This being the case, proposed §1180.11(b) is not required and constitutes an unnecessary and prejudicial burden. In addition, these provisions would in effect require transnational applicants to prove a negative – ie. the

absence of political control. This in turn raises additional serious questions related to fairness.

**Proposed §1180.11(b) -- Ownership Restrictions**

Proposed §1180.11(b) requires transnational applicants to "discuss" foreign ownership restrictions which apply to them. Ownership restrictions of course take many forms, and are not unique to foreign applicants. The STB has not, however, proposed any comparable provisions that would be applicable to domestic applicants. There is no apparent basis for the distinction. Moreover, with respect either to domestic or foreign restrictions, specific questions credibly raised by a party can be posed and answered in the course of a normal merger review. To require a foreign applicant to discuss them beforehand is both unfair and redundant.

**Proposed §1180.11(c) -- National Defense**

In proposed §1180.11(c), transnational applicants are required to "discuss and assess the national defense ramifications of the proposed merger". It is to be noted that there is a separate requirement in proposed §1180.1(l) which would require all applicants, be they foreign or domestic, to consider national defense issues. In light of this, proposed §1180.11(c) is clearly redundant.

In addition to this, however, the fact that this requirement is separately stated for transnational applicants could only make sense if the STB contemplated requiring more in this respect of a foreign applicant than of a domestic one. Thus, this requirement is

unfair both for its vagueness, and its singling out of transnational applicants. It should also be kept in mind that Canada and the United States are longstanding allies with a dense web of mutual defense obligations and agreements.

**Recommendation**

Given that proposed §1180.11 raises concerns with respect to unnecessary administrative burdens, transparency and fairness, and that these in turn represent potential violations of the NAFTA national treatment provisions, the Government of Canada requests that proposed §1180.11 be deleted in its entirety.

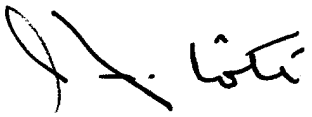
Indeed, it is our conclusion in considering proposed §1180.11 that it is simply unnecessary to the aims of the STB with respect to rail merger reviews. Appropriate information regarding transnational applicants (including information about safety, and defence) can be required through the provisions applicable to all applicants, notably the "full system plan" which it is proposed all applicants provide. Furthermore, it is always open to the Board to seek specific items of information in the course of a merger review that may be required in order to ensure that all aspects of the public interest are addressed. Dropping proposed §1180.11 would not leave the STB any less able to inform itself about transnational applicants.

At the same time, eliminating proposed §1180.11 would address the problem of national treatment which it provokes. Foreign merger applicants should be open to addressing specific factual questions which help the STB ensure that it has comparable information to that which it has for domestic applicants. However, in addition to the fact that such information requests are already provided for elsewhere in the proposed

regulations and in the normal course of a merger review, the fact that proposed §1180.11 takes the form of a preliminary requirement necessary to establishing the *prima facie* merits of a merger application means that foreign applicants face both additional and unnecessary risks and burdens in accessing the process of merger review. Unless this problem is addressed, it would constitute a violation of the national treatment provisions of the NAFTA.

The Canadian government remains open to providing the STB with any additional information if may require on the points raised above.

Respectfully submitted,

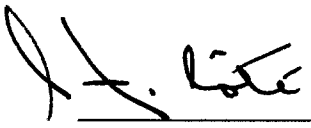


Bertin Côté,
Deputy Head of Mission and
Minister (Economic)
Embassy of Canada
501 Pennsylvania Avenue, N.W.
Washington, D.C. 20001-2111
(202) 682-1740 Ext. 7422

On Behalf of the Government of Canada

CERTIFICATE OF SERVICE

I certify that I have this 16th day of May, 2001, served copies of the foregoing Comment of the Canadian Government upon all known parties of record in this proceeding by first-class mail or a more expeditious method of delivery.



Bertin Côté